



# Guidance Document 17-04

Adopted June 15, 2017

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This guidance document is advisory in nature but is binding on the Nebraska Real Property Appraiser Board ("Board") until amended or repealed by the Board. A guidance document does not include internal procedural documents that only affect the internal operations of the Board and does not impose additional requirements or penalties on regulated parties or include confidential information or rules and regulations made in accordance with the Administrative Procedure Act. If you believe that this guidance document imposes additional requirements or penalties on regulated parties, you may request a review of the document (Neb. Rev. Stat. § 84-901.03 (2)).

**SUBJECT:** Public Records Policy

**LEGAL REFERENCE:** Neb. Rev. Stat. §§ 84-712 to 84-712.09 (Cum. Supp. 2016)

## SUMMARY OF ACTION

Approved by the Board at its September 21, 2006 meeting as Board Policy 06-10. Board Policy 06-10 was retired by the Board on May 24, 2017. Guidance Document 17-04 was adopted by the Board at its June 15, 2017 meeting as presented.

## BACKGROUND

Excerpt from September 21, 2006 meeting of the Nebraska Real Property Appraiser Board: *Director Ekstein explained the public records policy was provided by the attorneys who believed the board needed to adopt a policy. Requests have been received for documents contained in enforcement files. Investigatory information contained in the enforcement files is not considered public records. The policy is intended to specifically state which records are considered public information and which records are considered investigatory.*

*Director Ekstein read the proposed public records policy to those in attendance.*

*Vice Chair Newell moved to adopt the public records policy:*

*The Board shall comply fully with all applicable federal and state statutes and regulations which govern public records, including but not limited to Neb. Rev. Stat. Sections 84-712, and 84-712-03 to 84-712.09. Absent exceptional circumstances consistent with its duties as determined by the Board, the Board shall withhold from the public those records specified in Section 84-712.05 to the fullest extent permitted by law. "Exceptional circumstances" shall normal be limited to requests from other public entities, such as the board's counterparts in other states, which demonstrate a need for the information contained in such records and which commit to the Board that they shall not further disclose the requested information except in open court, open administrative proceedings, or in enforcement proceedings.*

*Board Member Wilson seconded the motion.*

*Discussion ensued regarding the public records policy.*

*Vice Chair Newell moved to amend her motion by adding 84-712.01 and changing 84-712-03 to 84-712.03. Board Member Wilson seconded the amendment.*

*Discussion continued regarding the policy.*

*Board Member Wilson called for the question. Board Members Bain, Kalkowski, Wilson, Newell and Kroeger voted aye.*

*Board Members Bain, Kalkowski, Wilson, Newell and Kroeger voted aye on the amendment.*

*Board Members Bain, Kalkowski, Wilson, Newell and Kroeger voted aye on the motion to adopt the Public Records Policy.*

LB 867, enacted by the Legislature in 2016, makes a number of changes to the rulemaking provisions of the Administrative Procedure Act ["APA"], Neb. Rev. Stat. §§ 84-901 to 84-918 (2014, and Cum. Supp. 2016). Agencies are authorized to issue "guidance documents," which are defined to "mean any statement developed by an agency which lacks the force of law but provides information or direction of general application to the public to interpret or implement statutes or such agency's rules or regulations." Guidance documents are binding on an agency until amended by the agency, and shall not give rise to any legal right or duty or be treated as authority for any standard, requirement, or policy. Guidance documents replace the Nebraska Real Property Appraiser Board's prior use of board policies to provide direction to the public, and to interpret or implement statutes and rules.

## ANALYSIS

Board Policy 06-10, which was adopted by the Board on September 21, 2006, was retired by the Board on May 24, 2017 to implement the former board policy as a guidance document. Neb. Rev. Stat. §§ 84-712 to 84-712.09 includes all public records laws that each state agency must comply with; except for Neb. Rev. Stat. § 84-712.05, the need to cite individual sections in the guidance does not exist. N.R.S. § 84-712.05 is the basis for a specific guidance on interpretation of this law, which is why it is specifically included in this guidance. All other statutory references are removed in the guidance.

The reference to “regulations” in Board Policy 06-10 is ambiguous. There was no mention of any specific provision of the Nebraska Administrative Code during the discussion that lead to adoption of Board Policy 06-10, and no known regulations pertaining to public records that binds the Board exists. Due to the possibility of binding the Board to unknown regulations, the reference to “regulations” is removed in the guidance.

Finally, there was no mention of any specific federal statutes during the initial discussion that lead to adoption of Board Policy 06-10. Many federal laws pertaining to public records exist; the most well-known being the Freedom of Information Act (“FOIA”). FOIA was signed into law by President Lyndon B. Johnson on July 4, 1966 as 5 USC § 522. FOIA is a federal law that allows for disclosure of previously unreleased information controlled by the United States Government, and defines what federal information and to what extent that documentation should be made available to the public. FOIA does not apply to state governments. Due to the possibility of binding the Board to FOIA and other federal public records statutes, the reference to “federal” statutes is removed in the guidance.

For the purpose of this guidance, the following language changes are made to Board Policy 06-10:

*The Board shall comply fully with all applicable ~~federal and~~ state statutes ~~and regulations~~ which govern public records, ~~including but not limited to Neb. Rev. Stat. §§ 84-712, 84-712.01, and 84-712.03, 84-712.09.~~*

## GUIDANCE

The Board shall comply fully with all applicable state statutes which govern public records. Absent exceptional circumstances consistent with its duties as determined by the Board, the Board shall withhold from the public those records specified in N.R.S. § 84-712.05 to the fullest extent permitted by law. “Exceptional circumstances” shall normally be limited to requests from other public entities, such as the Board’s counterparts in other states, which demonstrate a need for the information contained in such records and which commit to the board that they shall not further disclose the requested information except in open court, open administrative proceedings, or in enforcement proceedings.